BOULEVARD PLAZA SDN BHD v. GAS DISTRICT COOLING (PUTRAJAYA) SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
VERNON ONG LAM KIAT JCA
ZABARIAH MOHD YUSOF JCA
YEW JEN KIE JCA
[CIVIL APPEALS NO: W-02(NCC)(A)-1117-05-2018
& W-02(IM)(NCC)-1126-05-2018]
14 OCTOBER 2019

STATUTORY INTERPRETATION: *Construction of statutes – Interpretation – Companies Act 2016, s. 392(6) & (7) – Whether chilled water fell within category of 'supplies' – Whether chilled water supply a public utility essential and beneficial to public – Whether supplier had monopolistic control over supply – Whether supplier could insist on payment of pre-receivership charges as condition for continuous chilled water supply*

The appellant and the respondent entered into a supply agreement for the respondent to supply chilled water for 25 years to 'Menara Ikhlas' in Putrajaya ('building'), which was owned by the appellant. The respondent was the sole supplier of the chilled water for all the air conditioning systems in the premises within the Federal Territory of Putrajaya pursuant to an infrastructure agreement ('infrastructure agreement'). The appellant defaulted in the payment for the period from March 2017 to January 2018 in the sum of RM4,171,523.35 ('pre-receivership charges'). The appellant claimed that in a meeting held between the representatives of the receiver and manager ('R & M'), appointed to administer the management of the appellant who was under receivership, and the respondent: (i) the representative of the R & M informed the respondent that the appellant would be paying the charges for chilled water supply incurred during the receivership period; and (ii) it was agreed by the parties that in consideration of the R & M agreeing to pay for the charges incurred and to be incurred during the receivership period and submitting a proposal to address the pre-receivership charges by 26 January 2018, the respondent would not cease supplying the chilled water to the building ('compromised agreement'). The respondent denied making the representation and that in the meeting, it had asked the appellant to immediately submit a proposal of payment of pre-receivership charges to the respondent in consideration for the respondent to continue the chilled water supply, not by 26 January 2018. As it did not receive any immediate proposal from the appellants, the respondent issued its notice of termination dated 11 January 2018, giving the appellant 14 days to remedy its default, failing which the respondent would cease to supply the chilled water. In order to prevent the respondent from ceasing the chilled water supply to the building, the R & M filed an originating summons ('OS') and an injunction

application for an order to compel the respondent to continue the chilled water supply. The OS and the injunction application was dismissed wherein the High Court held that the chilled water does not come under the category of s. 392(6) and (7) of the Companies Act 2016 ('CA'). Hence, the present appeals on the issue as to whether chilled water falls within the category of 'supplies' of s. 392(6) of the CA.

Held (allowing appeals)
Per Yew Jen Kie JCA delivering the judgment of the court:

(1) To constitute public utility, it must be a service or work which embodies a public element benefiting a considerable number of people but not necessarily for the entire community. By virtue of the infrastructure agreement, the respondent was given the monopolistic control of chilled water in Putrajaya. The situation was acerbated as the people could not even source for chilled water from other supplier because of the respondent's monopoly. The word 'including' appearing in the provision clearly suggested that it is not exhaustive and not limited to water, gas, electricity and telecommunication. (paras 19, 24 & 42)

(2) Based on the plain reading of s. 392(6) of the CA and regard being had to the objective of Parliament in introducing s. 392(6) and (7), the chilled water clearly fell within the category of 'supplies' in s. 392(6) of the CA for the reasons that: (i) the chilled water supply is a public utility which was essential and beneficial to the public in Putrajaya; (ii) the respondent had the monopolistic control over the chilled water supply and the appellant had no other viable suppliers; (iii) the respondent should continue with the supply of chilled water as long as the appellant paid the new charges incurred during the receivership. The respondent could not insist payment of pre-receivership charges as a condition for continuous chilled water supply; and (iv) the R & M should be allowed to manage the appellant under receivership without any disruption to the provision of chilled water. (para 46)

(3) The respondent, while denying that there was a compromised agreement, admitted to the remaining terms of the compromised agreement that the R & M was agreeable to pay and/or to give an assurance that the amount due to the chilled water supply for the months of November and December would be paid. Further, the deferment of response to the appellant's letter clearly suggested that there was a compromised agreement reached between the appellant and the respondent. Hence, the trial judge was wrong to hold that 'correspondence between the parties post-meeting serves to support the defendant's contention'. (paras 52-54)

Case(s) referred to:
BB Nirman Sahkari Samiti v. State of Rajasthan AIR 1979 Raj 209 ***(refd)***
Citibank Bhd v. Mohamad Khalid Farzalur Rahaman & Ors [2000] 3 CLJ 739 CA ***(refd)***
M/S Earth Builders, Bombay v. State of Maharashtra AIR 1997 Bombay 149 ***(refd)***
Revenue and Custom Commissioners v. Football League Ltd [2012] EWHC 1372 ***(refd)***
United Malacca Rubber Estates Bhd v. Pentadbir Tanah Daerah Johor Bahru & Anor [1996] 1 LNS 108 HC ***(refd)***

Legislation referred to:
Companies Act 2016, ss. 392(6), (7), 414(7)(a), (b)
Interpretation Acts 1948 and 1967, s. 17A
Corporations Act 2001 [Aus], s. 600F
Insolvency Act 1986 [UK], s. 233(3)
Receiverships Act 1993 [NZ], s. 40

Other source(s) referred to:
Anandan Krishnan, *Words, Phrases & Maxim: Legally & Judicially Defined*, vol 9, p 374

For the appellants - Kelvin Seet Wan Nam & Lim Lay Yee; M/s Chooi & Company + Cheang & Ariff
For the respondents - Natalia Izra Nasaruddin & Ng Ying Ci; M/s Zul Rafique & Partners

[Editor's note: For the High Court judgment, please see Boulevard Plaza Sdn Bhd v. Gas District Cooling (Putrajaya) Sdn Bhd [2019] 5 CLJ 81 (overruled).]

Reported by S Barathi

JUDGMENT

Yew Jen Kie JCA:

[1] There are two appeals before the court, namely:

(i) Civil Appeal No. W-02(NCC)(A)-1117-05-2018 arising from the decision of the High Court, given on 22 May 2018, in dismissing the appellants' originating summons dated 17 January 2018 ("OS") against the respondent for an order to compel the respondent to continue to supply chilled water to the appellant.

(ii) Civil Appeal No. W-02(NCC)(A)-1126-2018 arising from the decision of the High Court, given on 22 May 2018, in dismissing the appellant's application for injunction dated 18 January 2018 ("the injunction appeal") against the respondent to compel the respondent to continue to supply chilled water to the appellant.

[2] The two appeals which are predicated on the same facts and circumstances and same issues were heard together.

Background Facts

[3] The appellant is the owner of a building called "Menara Ikhlas" in Putrajaya ("the building") and it has come under receivership.

[4] The respondent is the sole supplier of the chilled water for all the air conditioning systems in premises within the Federal Territory of Putrajaya ("Putrajaya"). It was appointed as the sole supplier by Perbadanan Putrajaya acting on behalf of the Federal Government, through an infrastructure agreement for the supply of chilled water dated 31 December 1998 ("the infrastructure agreement").

[5] Chilled water is defined as "the medium required to provide energy for air-conditioning ..." under the infrastructure agreement.

[6] The appellant and the respondent entered into an agreement dated 14 March 2014 whereby the respondent shall supply chilled water to the building for 25 years commencing from 1 March 2014 and expiring on 28 February 2038 ("the supply agreement"). The terms and conditions of the supply agreement are not in dispute.

[7] In breach of the supply agreement, the appellant is in default of payment for the period from March 2017 to January 2018 in the sum of RM4,171,523.35 ("pre-receivership charges").

[8] By the notice of appointment of receiver or receiver and manager dated 16 November 2017, the appellant informed the respondent of Mr Duar Tuan Kiat's appointment as receiver and manager ("the R & M") to administer the management of the appellant.

[9] A meeting was held on 4 January 2018 between the representatives of the R & M and the respondent, the appellant claimed that the following has transpired at the meeting:

(i) The representative of the R & M informed the respondent that the appellant would be paying the charges for chilled water supply incurred during the receivership period.

(ii) It was agreed by the parties that in consideration of the R & M agreeing to pay for the charges incurred and to be incurred during the receivership period and submitting a proposal to address the pre-receivership charges by 26 January 2018, the respondent would not cease supplying the chilled water to the building ("the compromised agreement').

[10] The respondent denied making any such representation. It claimed that in the meeting, it asked the appellant to immediately submit a proposal of payment of pre-receivership charges to the respondent in consideration for the respondent to continue the chilled water supply, not by 26 January 2018. The respondent issued its notice of termination dated 11 January 2018, as it did not receive any immediate proposal from the appellants. In this notice, the respondent gave the appellant 14 days (by 22 January 2018) to remedy its default, failing which the respondent shall cease to supply the chilled water.

[11] In order to prevent the respondent from ceasing the chilled water supply to the building on 22 January 2018, the R & M filed the OS and the injunction application for an order to compel the respondent to continue the chilled water supply.

[12] The learned judge dismissed the OS and the injunction application. Hence, the present two appeals.

The Issue

[13] The issue before the High Court as well as in this appeal turns on the interpretation of s. 392(6) and (7) of the Companies Act 2016 ("CA 2016"), namely, whether the chilled water comes within the category of "supplies" of s. 392(6) CA 2016.

The Law

[14] Section 392(6) and (7) of the CA 2016 states:

> 392. Payments of certain debts subject to floating charge in priority to claims under charge
>
> (6) If a request is made by or with the concurrence of the receiver or receiver and manager for the giving of any of the supplies including water, electricity, gas and telecommunications, after the appointment of the receiver or receiver and manager, the supplier may make it a condition of the giving of the supply that the receiver or receiver and manager personally guarantees the payment of any charges in respect of the supply given after his appointment.
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> (7) Notwithstanding subsection (6), the supplier shall not make it a condition of the giving of the supply, or do anything which has the effect of making it a condition of the giving of the supply, that any outstanding charges in respect of a supply given to the company before the appointment of receiver or receiver and manager are paid.

High Court's Decision

[15] The learned judge decided that the chilled water does not come under the category of s. 392(6) and (7) on the following grounds:

> [42] Now I have emphasised the phrase 'utilities' as opposed to 'essential service' as favoured by the plaintiff, as water, electricity, gas and telecommunication are utilities, in fact, public utilities. Furthermore, the corporate law reform committee had in the excerpt of the report referred to by the plaintiff, specifically mentioned 'utility suppliers'.[1]
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> ...
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> [45] Utilities, by its common understanding, are products that are for public consumption, which arguably are products that the public could not live without. They are crucial for any corporation to carry out their daily operations.[2]

> [46] Chilled water, unlike electricity, is not for public consumption at large. I am not inclined to add chilled water to the list of supplies under s. 392(6) CA 2016. I am of the view that s. 392(6) and (7) CA 2016 governs public utilities, and that it does not include chilled water.[3]
>
> [47] I accept the fact that the air-conditioning is a necessary comfort, particularly in a tropical climate such as ours. The absence of chilled water would no doubt disable the building's air-conditioning system. However, as the defendant had rightfully pointed out, the plaintiff is not without a solution, for it can install air-conditioners or even rent portable ones. Water and electricity on the other hand, cannot be replicated or sourced, other than from the public utility companies that supply them.
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> [48] I have considered the Plaintiff's contention that the defendant has a monopoly over the supply of chilled water in Putrajaya. The Plaintiff has also attempted to equate the defendant's monopolistic control to that of the utility companies such as Tenaga Nasional. The distinction is this: utility companies such as Tenaga Nasional Berhad provide utilities for the public at large. The chilled water provided by the defendant on the other hand, does not come under this category. It is targeted to specific entities. More crucially, it is not mandatory for chilled water to be purchased. The Plaintiff has a choice.[4]

[16] Essentially, the learned judge opined that the phrase "supplies including water, electricity, gas and telecommunications" appearing in s. 392(6) of CA 2016 are exhaustive and that they refer to "utilities" or "public utilities" supplied by public utility companies (which has the monopolistic control over the supply) to the public at large (who cannot live without such utilities). Although the respondent has monopolistic control over the chilled water supply in Putrajaya, it cannot be equated to utility companies which provide to public at large and the chilled water is not for public consumption at large. Besides, the appellant had option to install air-conditioners or rent portable one. Accordingly, the chilled water does not come within the category of supplies of s. 392(6) CA 2016.

[17] We find the learned judge was plainly wrong and our reasons are as follows.

[18] Our attention was drawn by the appellant to an Indian case of *M/S Earth Builders, Bombay v. State of Maharashtra*[5], where it was held that the words 'public utility' are not capable of precise meaning. The question of whether a service is a public utility or not will have to be decided in the context of the particular situation.

[19] Although there is no uniform definition of the words 'public utility' and "utilities', it is abundantly clear that to constitute public utility, it must be a service or work which embodies a public element benefiting a considerable number of people but not necessarily for the entire community.

[20] This view is adopted in *BB Nirman Sahkari Samiti v. State of Rajasthan*[6], where the court held that 'public utility' means any work, project which is going to be useful to members of the public at large. The public to benefit or intended to benefit need not be the entire community but to a considerable number of people. At p. 213:

> 22. The dictionary meaning given by *Black's Law Dictionary to 'public utility 'can only be illustrative and not exhaustive*. The land acquisition is not restricted for the utility of any particular class or community but is for the utility of public at large. It is difficult to agree to the view that the word 'public' purpose cannot be analogous to public utility as held in the above case. To me, it appears that the word 'public' qualifies the purpose. *Public utility means any work project which is going to be useful to members of the public at large, in generic sense but it would certainly be utilised in fact by a section or a class or limited number of persons who would come in contact with that particular work or scheme and would utilities it for that purpose*. To illustrate again an irrigation and water dam can only be utilised by persons who are cultivating the land or irrigating the land and businessmen cannot utilise the irrigation facilities provided by the irrigation canal or irrigation dam or irrigation project but due to that irrigation canal or irrigation dam would not cease to be a public utility. Again, electricity project can only be utilised by those citizens or towns where the electricity of that project is made available and that too, to only limited consumers to whom electricity connections if it is offered to them. That would not detract the electricity services from being of public utility. The same is the case of railways, telephones etc. A Housing Board or the planned development of the urban area of Jaipur City would be utilised and be of utilisation to the general public in generic sense but in narrow sense it would certainly be utilised only by those members of people who would get allotment by lottery or otherwise or who would pass through those roads constructed there or would go any play in the gardens or would send their children to the schools constructed, if any, in that area. (emphasis added)

[21] In *United Malacca Rubber Estates Bhd v. Pentadbir Tanah Daerah Johor Bahru & Anor*,[7] the High Court held that public utility could mean "usefulness for" or "in the service of the public" and "an undertaking for a general utility of the public". It was held:

> ... the words "*person or corporation undertaking a work which in the opinion of the state authority is of public utility*" ... appearing in s. 37(7) of the Land Acquisition Act 1960 ... In my view *these words are not restricted to refer only to state governments or persons or corporations, including statutory bodies performing some public service, eg a gas corporation or a water board, but would include companies* incorporated under the Companies Act 1965 which are empowered by its memorandum and articles of association *and appointed by any government or public authority to perform an undertaking for the general utility of the public. ...*

Be that as it may, I would think that before the main issue in the instant case can be determined, a question which needs to be answered first would be, 'what is "an undertaking of public utility"?' In relation to the words '*public utility*' 3 *Words and Phrases Legally Defined* (3rd Ed) states as follows:

> *Literally the word 'utility' means usefulness but it is commonly used to refer to a corporation that performs a public service and so is a public utility*. Hence railroads, airlines, bus lines, gas and electricity corporations are known as 'public utilities'. *Webster* defines a 'public utility' as a business organization performing some public service and, hence, subject to special governmental regulations such as fixing of rates and requirements of incidental facilities. *The Shorter Oxford Dictionary* defines 'public utilities' as the services or supplies commonly available in large towns such as omnibuses, electricity, water etc. *The expression 'of public utility' could mean 'of usefulness for' or 'in the service of the public' and so 'an undertaking for the general utility of the public*'. (emphasis added).

[22] It can also be seen from *United Malacca Rubber Estates (supra)*, that the suppliers of public utilities are not confined to public utility suppliers set up by the Government; it may include companies appointed by the government or public authority to undertake the task of provision.

[23] As submitted by learned counsel for the appellant, the public element of the chilled water supply is made abundantly clear from the following undisputed facts and evidence:

(i) Recital A of the infrastructure agreement entered into between the respondent and Perbadanan Putrajaya[8] showed that Perbadanan Putrajaya is a body corporate established under the Perbadanan Putrajaya Act 1995. Its function is to administer and manage the Kawasan Perbadanan Putrajaya on behalf of the Federal Government. It is empowered to, *inter alia*, regulate, co-ordinate and undertake the development of infrastructure in Putrajaya. Whereas the respondent is a company incorporated in Malaysia.

(ii) Section 1 of the infrastructure agreement defines "chilled water to mean "the medium required to provide energy for air-conditioning produced from the plant as specified in the Perbadanan needs statement".

(iii) Pursuant to cl. 2. 1 under "policy statements and directions" of the infrastructure agreement, the Perbadanan Putrajaya shall determine what constitutes a public interest element.

(iv) Pursuant to cl. 3.1 under "Consideration & General Obligation Of GDC" of the infrastructure agreement, the Perbadanan Putrajaya allowed the respondent to utilise the land designated for the construction of the district cooling plants **to provide the chilled water service to all buildings in Putrajaya**. (emphasis added)

(v) Pursuant to cl. 5.1 under "Design And "As Built" Drawing" of the infrastructure agreement, the respondent has to obtain approvals from the Town and Country Planning Act 1976 and the Street, Drainage and Building Act 1974, in relation to the chilled water supply.

(vi) The Town and Country Planning Act 1976 regulates and controls town and country planning whereas the Street, Drainage and Building Act 1974 governs streets, drainage and building in local authority areas. Clearly, these are matters which benefit members of the public.

(vii) Perbadanan needs statement under "Overall Development"[9] showed the extent of the overall development, which comprised the total land area of approximately 4581 hectares, approximately 67 residential units, 3.8M square meters of Government offices, 3.4M square meters of commercial spaces, public transport terminals, hotels, gardens and parks.

(viii) Clause 21.2 under "Event Of Emergency"[10] of the infrastructure agreement empowers the Federal Government to step in to "expropriate the infrastructure for the supply of chilled water" to prevent disruption of chilled water supply without any compensation to the respondent.

[24] The above provisions in the infrastructure agreement make it conspicuously clear that the Federal Government through Perbadanan Putrajaya has appointed the respondent as the sole provider of chilled water to all the buildings in Putrajaya. By virtue of the infrastructure agreement, the respondent is given the monopolistic control of chilled water in Putrajaya. It is unquestionable that the respondent is providing an essential service to Cyberjaya. Any disruption to this service will cause breakdown in the air-conditioning system in a building which will affect the smooth operation of business and enjoyment of life to the end users. The situation is acerbated as the people cannot even source for chilled water from other supplier because of the respondent's monopoly.

[25] The monopolistic nature of chilled water supply had not escaped the attention of the learned judge, for he said:

> [15] it is undisputed that the defendant is the sole provider of chilled water to all buildings in the Federal Territory of Putrajaya, including the building. It goes without saying that the defendant has a monopoly over the supply of chilled water, which meant that the plaintiff had no other viable suppliers to turn to. The building's centralised air-conditioning could not function without the chilled water.

[26] In the circumstances, it is plainly clear that the chilled water is a public utility in Putrajaya and it therefore falls under the category of "supplies" in s. 392(6) and (7) CA 2016. As such, the respondent shall not make payment of pre-receivership charges as a condition for its future supply of chilled water service to the building.

Issue (b): Whether Purposive Approach Ought To Be Adopted In Interpreting s. 392(6) And (7) Of CA 2016

[27] The learned judge rejected the appellant's proposition that the court should give s. 392(6) and (7) CA 2016 a purposive construction, and held:

> [43] The Plaintiff's attempt to urge this court to give the sections a purposive construction is also equally attractive, as it does make sense that the idea behind s. 392(6) and (7) CA 2016 is to prevent companies under receivership from encountering difficulties to manage the company successfully. If that was indeed the case, it would open the definition of supply to a wide category. Raw materials are, for example, essential to the production or manufacturing companies.
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> [44] I am however, disinclined to agree with the Plaintiffs' propositions.
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> ...
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> [55] As for the Plaintiff's submission that s. 392(6) and (7) CA 2016 should be given a purposive approach, I am of the view that the words in the sections are clear, in that the only supplies concerned are water, electricity, gas and telecommunication. It is my judgment that s. 392(6) and (7) CA 2016 was not drafted to allow the list of supplies stated in non-exhaustive. These sections must be given its plain meaning.
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> ...
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> [57] I can appreciate the difficulty that the Plaintiff's receiver and manager would face in managing the building's tenants without having air-conditioning. The only solution however, is to expand the list of supplies, or provide a guideline on what constitute supplies under s. 392(6) and (7) CA 2016. That task lies with the legislative, for the court's duty is to interpret a statute, and not to legislate.

[28] The new Companies Act 2016 which replaced the former Companies Act 1965 introduced s. 392(6) and (7) together with s. 414(7)(a) and (b).

[29] Section 414(7)(a) and (b) of the CA 2016 states:

> (7) If a request is made by or with the concurrence of the judicial manager for the giving of any of the supplies including water, electricity, gas and telecommunications, after the making of the judicial management order:
>
> (a) the supplier may make it a condition of the giving of the supply that the judicial manager personally guarantees the payment of any charges in respect of the supply given after the judicial manager's appointment; or
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> (b) the supplier shall not make it a condition of the giving of the supply, or do anything which has the effect of making it a condition of the giving of the supply, that any outstanding charges in respect of a supply given to the company before the making of the judicial management order are paid.

[30] The two provisions are similar other than s. 392(6) and (7) concerns a company under a receivership order while s. 414(7)(a) and (b) concerns a company under a judicial management order.

[31] *The Review of the Companies Act 1965 – Final Report* ("CLRC report") made by the Corporate Law Reform Committee ("CLRC"), upon recommending the provisions of s. 414(7)(a) and (b) of the CA 2016, explained that the rationale of the said provision is to ensure that utility supplier with monopolistic control continues to provide supply to a company under a judicial management order as long as the new debts incurred by the company are paid.

[32] The CLRC report, Chapter 4, Corporate Insolvency, para 14.06 reads:

> 14.06 There are also suggestion that:
>
> (a) utility suppliers with monopolistic control such as Tenaga Nasional (TNB), Telekom, etc. should be obliged to continue to provide supplies to a company with respect to which a judicial management order has been made so long as the new debts incurred are paid. They should not cease supply or discontinue services on the ground that the "old debts" are not paid;
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> (b) no steps are to be taken to commence or to continue the enforcement of a sale of land of such a company under the National Land Code except with the leave of the court.
>
> Hence, CLRC recommends at Recommendation 4.26: "(a) utility suppliers with monopolistic control such as Tenaga Nasional Berhad (TNB), Telekom, etc. should be obliged to continue to provide supplies to a company with respect to which a judicial management order has been made so long as new debts incurred by such a company are paid.

[33] Given the similarities between s. 392(6) and (7) and s. 414(7)(a) and (b) of the CA 2016, the rationale explained by the CLRC in respect of s. 414(7)(a) and (b) of the CA should equally apply to s. 392(6) and (7), that is, to ensure that suppliers with monopolistic control to continue to provide supply to a company under receivership or judicial management as long as new debts incurred are paid.

[34] It is pertinent to note that there are equivalent provisions in other jurisdiction. In United Kingdom, s. 233 of the Insolvency Act 1986 reads:

> Supplies of gas, water, electricity, etc.
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> (1) This section applies in the case of a company where:
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> (a) an administration order is made in relation to the company, or
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> (b) an administrative receiver is appointed, or
>
> (ba) a moratorium under section 1A is in force, or
>
> (c) a voluntary arrangement approved under Part I, has taken effect, or

(d) the company goes into liquidation, or

(e) a provisional liquidator is appointed;

and "the office-holder" means the administrator, the administrative receiver, the nominee, the supervisor of the voluntary arrangement, the liquidator or the provisional liquidator, as the case may be.

(2) If a request is made by or with the concurrence of the office-holder for the giving, after the effective date, of any of the supplies mentioned in the next subsection, the supplier:

(a) may make it a condition of the giving of the supply that the office-holder personally guarantees the payment of any charges in respect of the supply, but

(b) shall not make it a condition of the giving of the supply, or do anything which has the effect of making it a condition of the giving of the supply, that any outstanding charges in respect of a supply given to the company before the effective date are paid.

[35] In *Revenue and Custom Commissioners v. Football League Ltd*,[11] the court held that s. 233 of the Insolvency Act 1986 imposes a prohibition on the utilities supplier from requiring the payment of pre-liquidation arrears of charges as a condition of further supplies. At para. [167]:

This is well illustrated by *Wellworth Cash & Carry (North Shields) Ltd v. Northeastern Electricity Board* [1986] BCC 99, 265. In that case the plaintiff company was in insolvent liquidation and the defendant electricity board was a creditor for arrears of charges. The electricity board was under a statutory obligation to supply electricity to the company unless the company was in arrears. The company's business depended on the continued supply of electricity and the liquidator had decided to continue the business as being in the best interests of creditors generally. The electricity board refused to continue the supply unless all arrears, which would be provide debts in the liquidation, were paid in full. Peter Gibson J refused to grant an injunction requiring the electricity board to continue the supply without this condition, holding that it was entitled to impose the requirement as a condition of further supplies, even though it would result in priority for the electricity board contrary to the *pari passu* principle. The decision would have gone the other way if by then s.97 Insolvency Act 1985 (now s. 233 Insolvency Act 1986) had been brought into force. Section 233 prohibits utility suppliers from requiring the payment of pre-administration or pre-liquidation arrears of charges as a condition of future supplies.

[36] In Australia, the equivalent provision section found in s. 600F of the Corporations Act 2001, states:

(1) If:

(a) a relevant authority of an eligible company requests, or authorizes someone else to request, a person or authority (the supplier) to supply an essential service to the company in Australia; and

A (b) the company owes an amount to the supplier in respect of the supply of the essential service before the effective day;

the supplier must not:

(c) refuse to comply with the request for the reason only that the amount is owing; or

B (d) make it a condition of the supply of the essential service pursuant to the request that the amount is to be paid.

[37] The rationale underlying s. 600F of the Australian Corporation Act 2001, which is similar to that propounded by CLRC, is found in Australian C Corporations & Securities Law Reporter, where it is stated at pp. 252, 754, as follows:

> Section 600F is designed to ensure that a liquidator or other external administrator of a company that is being wound up or subject to some other form of external administration is not prevented from carrying out D his or her tasks by a supplier who refuses to supply or to continue to supply an essential service until all outstanding amounts are paid to the supplier. For example, an administrator of a company would have difficulty in attending to the business of the company if gas, water and electricity services to the company's place of business were cut off.

E **[38]** In New Zealand, the equivalent provision found in s. 40 of the Receiverships Act 1993, reads:

> 40 Refusal to supply essential services prohibited
>
> (1) For the purposes of this section, an essential service means
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> (a) the retail supply of gas;
>
> F (b) the retail supply of electricity;
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> (c) the supply of water;
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> (d) telecommunications services.
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> G (2) For the purposes of this section, telecommunications services means the conveyance from one device to another by any line, radio frequency or other medium of any sign, signal, impulse, writing, image, sound, instruction, information, or intelligence of any nature, whether or not for the information of a person using the device.
>
> H (3) Notwithstanding the provisions of any other Act or any contract, a supplier of an essential service must not:
>
> (a) refuse to supply the service to a receiver or to the owner of property in receivership by reason of the grantor's default in paying charges due for the service in relation to a period before the date of the appointment of the receiver; or
>
> I (b) make it a condition of the further supply of the service to a receiver or to the owner of property in receivership that payment be made of outstanding charges due for the service in relation to a period before the date of the appointment of the receiver.

[39] Section 17A of the Interpretation Acts 1948 and 1967 states: A

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[40] In *Citibank Bhd v. Mohamad Khalid Farzalur Rahaman & Ors*,[12] ,this court held that by virtue of s. 17A of the Interpretation Acts 1948 and 1967, Parliament requires the court to apply the purposive approach in interpreting all statutes. At pp. 746 to 747: B

> ... Their analysis led them to formulate four different rules of construction which they thought moved the courts to interpret statutes in a particular way. They termed these as the literal rule, the golden rule, the mischief rule and the purposive rule. More recently, Professor Rupert Cross formulated what he termed as "the unified contextual approach". This in essence combines all these so-called rules in a step by step process to discovering the meaning of statutory language. Each of the suggested methods offers a different approach to the construction of a statute. The literal rule pays attention to nothing more and nothing less than the actual words used by the statute. The golden rule permits the judicial interpreter in very limited circumstances to supply an omission in a statutory provision where the literal approach leads to absurdity or injustice. The mischief rule looks to the state of the law at the time an Act was passed to see the mischief or defect that Parliament seeks to remedy. Finally there is the purposive approach which is a refinement of the mischief rule. This requires a court to look to the purpose of an Act. What is significant is that all these differing approaches are used to as certain what Parliament intended to communicate when it used particular words in a statute. Despite the several available approaches, it is noteworthy that it is the purposive approach that has emerged to hold the field. C D E F
>
> Thus, in *Pepper v. Hart* [1993] 1 All ER 42, 50, Lord Griffiths said:
>
> > The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted. G H
>
> In our jurisdiction Parliament has given effect to the common law position by requiring a court to apply the purposive approach to all statutes. The relevant provision is Interpretation Acts 1948 & 1967, s. 17A ... .

[41] Regards being had to the objective of introducing s. 392(6) in the new CA 2016 as mentioned above, we do not hesitate to say that the learned judge was plainly wrong when he refused to take a purposive approach in interpreting the said section. I

[42] We hasten to add that the learned judge was also plainly wrong in his reading of s. 392(6). On plain reading, the word 'including' appearing in the said provision clearly suggests that it is not exhaustive and it is not limited to water, gas, electricity and telecommunication.

[43] In *Words, Phrases & Maxim: Legally & Judicially Defined* (vol. 9) by Anandan Krishnan, it explains the word "including" at p. 374:

> "Including" is a term of extension. It imports addition. It adds to the subject matter already comprised in the definition … The expression "including" is very generally used in interpretation clauses in order **to enlarge the meaning of words or phrases occurring in the body of Statute**; when it is so used, these words or phrases must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares, that they shall including … (emphasis added)

[44] By the use of the word "including" in s. 392(6) CA 2016, it clearly shows that the Legislature intentionally has left it open so that the court in appropriate cases can enlarge the meaning of the words to include other public utilities such as chilled water in the present case.

[45] Unlike our s. 392(6) CA 2016, s. 233(3) of the UK Insolvency Act 1986 specifically lists down the supplies.

Section 233(3) of the Insolvency Act 1989, reads:

(a) a supply of gas by a gas supplier within the meaning of Part 1 of the Gas Act 1986;

(b) a supply of electricity by an electricity supplier within the meaning of Part 1 of the Electricity Act 1989;

(c) a supply of water by a water undertaker or, in Scotland, Scottish Water,

(d) a supply of communications services by a provider of a public electronic communications service.

[46] It is our firm view that based on the plain reading of s. 392(6) CA 2016 and regard being had to the objective of Parliament of introduction of s. 392(6) and (7), the chilled water clearly falls within the category of "supplies" in s. 392(6) CA 2016 for the reasons that:

(i) The chilled water supply is a public utility which is essential and beneficial to the public in Putrajaya.

(ii) The respondent has the monopolistic control over the chilled water supply and the appellant has no other viable suppliers.

(iii) The respondent should continue with the supply of chilled water as long as the appellant pays the new charges incurred during the receivership. The respondent cannot insist payment of pre-receivership charges as condition for continuous chilled water supply.

(iv) The R & M should be allowed to manage the appellant under receivership without any disruption to the provision of chilled water.

[47] We therefore find appealable error to warrant the appellate intervention.

There Was A Compromised Agreement Between The Appellant And The Respondent

[48] The learned judge accepted the respondent's submission that there was no compromised agreement between the parties. His Lordship held in para. [60]:[13]

> [60] Unless there are compelling evidence to substantiate, or a lack of denial from the other party, an allegation made in an affidavit remains unproven. The internal memorandum, in my respectful view, if self-serving, and does nothing to add weight to the plaintiff's version. In fact, the correspondence between the parties post-meeting serves to support the defendant's contention. I am therefore unable to accept the plaintiff's version.

[49] Before us, the respondent regurgitated the same argument that in the absence of supporting document such as the minutes of meeting on the purported deadline ie, 26 January 2018 by which the appellant should submit its proposal, the appellant's internal memorandum[14] is self-serving and does not support the appellant's claim. Hence, the appellant's assertion must fail.

[50] With respect, we do not agree. We agreed with the appellant's submission that the internal memorandum is a contemporaneous documentary evidence, there is no basis for the learned judge to find it "self-serving".

[51] The internal memorandum produced by the appellant reads:

> ... Lee highlighted that in order for GDC to consider providing continued supply to Menara Ikhlas, our proposal must address:
>
> - Full settlement of the outstanding Pre-Receivership amounts.
> - Commitments by the R&M to ensure timely settlement of GDC's invoices during the receivership period e.g. Bank guarantee, letter of undertaking or cash deposit etc.
> - The above proposal to GDC is to be submitted by 26 January 2018 failing which GDC will take the necessary actions to recover the outstanding amounts and also discontinue supply to Menara Ikhlas.

[52] It is to be noted that the respondent merely denied the existence of compromised agreement and it did not adduce any evidence to contradict the contents of the internal memorandum. Interestingly, however, while denying that there was a compromised agreement, the respondent admitted to the remaining terms of the compromised agreement that the R&M was agreeable

to pay and/or to give an assurance that the amounts due to the chilled water supply for the months of November and December would be paid. (see para. 33 of the respondent's affidavit in reply dated 28 February 2018).[15]

[53] It is also interesting to note that the respondent's reply to the appellant's solicitors' letter dated 12 January 2018[16] reminding the respondent of the compromised agreement and demanded the respondent to retract and withdraw the notice of termination, and that the appellant is in the midst of arranging payment for charges incurred during the receivership period in November 2017. In reply, the respondent's solicitors *vide* its letter dated 16 January 2017[17] informed, *inter alia*, they would only be issuing a full response by close of business on 25 January 2018 (which was three days after the dateline 22 January 2018 the respondent notified it would cease the chilled water supply). One might ask: if indeed there was no compromised agreement, the respondent could have immediately responded by putting the record straight instead of deferring the response to a date past the notified date of termination. The deferment of response to the appellant's letter clearly suggests there was a compromised agreement reached between the appellant and the respondent on 4 January 2018.

[54] In the circumstances, we agree with the appellant that the learned judge was wrong to hold that "correspondence between the parties post-meeting serves to support the defendant's contention"[18]

Conclusion

[55] For all the reasons aforesaid, we find that there are appealable errors to warrant the appellant's intervention. It is our unanimous decision that both the appeals should be allowed. We order in terms of prayers 1 and 2 of the OS. We set aside the High Court orders dated 22 May 2018. Cost of RM10,000 here and below to the appellant subject to allocatur.

Endnotes:

1. Page 21, rekod rayuan tambahan.
2. Page 22, rekod rayuan tambahan.
3. Page 22, rekod rayuan tambahan.
4. Pages 22 to 23, rekod rayuan tambahan.
5. *M/S Earth Builders, Bombay v. State of Maharashtra* AIR 1997 Bombay 149
6. *BB Nirman Sahkari Samiti v. State of Rajasthan* AIR 1979 Raj 209
7. *United Malacca Rubber Estates Bhd v. Pentadbir Tanah Daerah Johor Bahru & Anor* [1996] 1 LNS 108; [1997] 4 MLJ 1 HC.
8. Tag 2, p. 230 of appellant core bundle.
9. Page 263 of appellant core bundle.

10. Page 254 of appellant core bundle.
11. *Revenue and Custom Commissioners v. Football League Ltd* [2012] EWHC 1372.
12. *Citibank Bhd v. Mohamad Khalid Farzalur Rahaman & Ors* [2000] 3 CLJ 739 CA.
13. Page 27, rekod rayuan tambahan.
14. Page 205, rekod rayuan tambahan.
15. Page 86 of RR 1(1) in the OS Appeal.
16. Pages 211 to 214 of RR (2)(1) of OS Appeal.
17. Pages 220 to 221 of RR 2(1) of OS Appeal.
18. Paragraph [60] of judgment, p. 27 of rekod rayuan tambahan.